Supreme Court, U.S.
FILED

001627 APR 24 2001

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No.

In The

Supreme Court of the United States

RONALD M. BARON,

Petitioner

v.

CITY OF BROADVIEW HEIGHTS

Respondent

On Petition For Writ of Certiorari
To The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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5APP

QUESTIONS PRESENTED

l). Whether an accused in a jury trial can be denied his right to Cross-Examination of a witness for the prosecution, after that witness has testified on matters relevant to both culpability and credibility?

2). Whether an accused in a jury trial can be denied his right to Cross-Examination of a witness for the prosecution, after it has been established in an in camera proceeding, that the witness has perjured himself on matters relevant to both culpability and credibility?

3) Whether an accused in a jury trial can be denied his right to Cross-Examination of a witness for the prosecution, after it has been established that the prosecutor has misrepresented the truth to the trial court on matters relevant to both culpability and credibility?

4) Whether it can ever be harmless error, when an accused in a jury trial is denied his right to cross-examine a witness for the prosecution after that witness has testified on matters relevant to both culpability and credibility?

PARTIES TO THE PROCEEDING

All of the parties to the proceedings appear on the cover of this Petition. They are the Petitioner, Ronald M. Baron and the Respondent, the City of Broadview Heights.

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of The Supreme Court of Ohio entered on January 24, 2001.

OPINIONS BELOW

The decision of The Ohio Supreme Court is unreported, (00-1883 January 24, 2001). The final order of the Court of Appeals of Ohio, Eighth District, is also unreported, (76490 September 14, 2000) is also unreported. The decision of Parma Municipal Court is also unreported, (98CRB2122 et al. May, 18, 1999) is also unreported.

BASIS FOR JURISDICTION

The final Judgment of the Ohio Supreme Court was entered on January 24, 2001. This present appeal is timely brought on April 24, 2001 under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Constitution, Amendment XIV, Section 1.: ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Ronald M. Baron, a totally disabled, combat related, Vietnam Veteran was convicted of eight counts of Telephone Harassment, to wit: misdemeanors arising out of four alleged phone calls to the Broadview Heights Police Department and five other misdemeanor counts of Disorderly Conduct and Menacing. He was sentenced to and served eighteen months in the County Jail.

At the jury trial, the Petitioner, subpoenaed the police custodian to bring in the original telephone logging tapes in his legal possession as well as a TEAC machine on which they could be played for the Jury. The original tapes were critical to the Petitioner's defense because they contained a unique digital time-date stamp that could not be replicated on a duplicate cassette. From the outset, the Petitioner contended that if the original logging tapes were played for the dates and times alleged in the criminal prosecution, they would unquestionably reveal that he did not make a single harassing telephone call to the police.

The prosecution went to great lengths to establish that telephone calls were made either from inside the Petitioner's home or the telephone jacks outside the Petitioner's home, but the prosecution could not conclusively establish either the nature of the calls or the person or persons making those calls. Only the original telephone logging tapes in the legal possession of the police custodian could do that.

At trial, the prosecution called two dispatchers to testify that they recalled the Petitioner making the harassing phone calls. They also testified that the calls they recalled would have been recorded word for word on the telephone

logging machine protected by the unique digital date-time stamp. The prosecution then called the police custodian, who had legal custody of this key piece of evidence. While never producing the subpoenaed tapes, he testified before the jury, that not only were the duplicates introduced into evidence at trial accurate reproductions of the "actual tapes" (original TEAC logging tapes), the actual tapes were heard on criminal discovery by both the Petitioner and Defense Counsel. That statement was outright perjury. Defense Counsel specifically requested to hear the original tapes that the Petitioner contended were exculpatory. Instead the police custodian played other original TEAC logging tapes for other times and dates that have absolutely no bearing on this or any other criminal prosecution. At the close of Direct Examination, the jury was left with the unmistakable impression that the Petitioner and Defense Counsel were attempting to deceive the jury by still contending that the original tapes were exculpatory.

On Cross-Examination, Defense Counsel was only permitted to verify the surname of the police custodian and in three other brief questions, the fact that when a telephone call comes in it is recorded on a TEAC machine with a time and date stamp. The Trial Court, dismissed the jury from the courtroom and brought the Cross-Examination to a close. Outside the presence of the jury, but on the record, the Prosecutor misrepresented to the Trial Court that the Defense Counsel had "listened to the originals". The trial court threatened Defense Counsel with ethical grievance proceedings and before excusing the witness held an in camera hearing. At the in camera hearing, the police custodian, admitted despite his testimony to the contrary before the jury that he was not sure if Defense Counsel had heard the originals, because they might have been "recycled".

It was not until Oral Arguments before the State Court of Appeals, that the Prosecutor admitted that he had no personal knowledge of Defense Counsel listening to the key original tapes, and that he was merely relying on what has been demonstrated to be the misrepresentation of the police custodian.

Despite the trial court's awareness of the police custodian's misrepresentation before the jury on Direct Examination by the Prosecutor, as a result of the brief in camera proceeding, the Trial Court excused the police custodian from the trial denying the Petitioner any Cross-Examination of this key witness for the state.

On Appeal, the state Court of Appeals, found that the Trial Court, abused its discretion[1] in prohibiting appellant's

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[1] In the instant case, we find that the excluded evidence was directly related to one of the critical issues of the trial, i.e., whether appellant made harassing telephone calls to the Broadview Heights Police Department on the dates and times in question. Appellant contended throughout the trial that he did not make the telephone calls at issue and the cassette tape recording of the calls was a fabrication. He asserted that the original TEAC tapes, which show the date and time of each telephone call made to the Broadview Heights Police Department, would be exculpatory because they would show that it was impossible for him to have made the telephone calls to the Police Department on the dates and times in question. Therefore, the whereabouts of the original TEAC tapes and the reasons for their unavailability at trial was relevant evidence and a proper subject of cross-examination.

Moreover, the trial judge erred in finding that defense counsel did not have a good faith basis to challenge the authenticity of the cassette tape. The trial judge made its finding based on Grossnickle's testimony on direct examination that defense counsel had listened to the original TEAC tapes. However, upon questioning by the trial judge after

cross-examination of the police custodian, with respect to whether Defense Counsel had listened to the original tapes, the whereabouts of the original tapes, and the authenticity of the duplicate tapes. The Court of Appeals, however, ruled that the Trial Court's decision to deny cross-examination of the police custodian constituted harmless error.

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the jury had been excused, Grossnickle admitted that he did not know if defense counsel had listened to the original TEAC tapes or the telephone calls at issue; he knew only that he had played some TEAC tapes for defense counsel. Accordingly, the trial court abused its discretion in prohibiting appellant's cross-examination of Grossnickle concerning whether defense counsel had listened to the original TEAC tapes of the harassing telephone calls, the whereabouts of the original TEAC tapes and the authenticity of the cassette tape recording of the calls. (underline added)
(Court of Appeals Judgment Entry at III in City of Broadview Heights v. Ronald M. Baron, Case No. 76490). The full opinion is in the attached Appendix to this Petition for Writ of Certiorari.)

The Court of Appeals, after vigorously pursuing the line of questioning at Oral Argument, glossed over the admission by the Prosecutor, that his representation to the trial court was not true. The Prosecutor told the Court of Appeals at Oral Arguments that he had relied on the representation of the police custodian, in representing to the Trial Court that the original tapes had been heard by Defense Counsel. The Jury was never informed by the Trial Court that the testimony elicited by the Prosecutor from the police custodian on Direct Examination was false. Having dismissed the police custodian after the in camera proceeding, there was no opportunity to correct the material misrepresentation by way of cross-examination.

After the announcement of its decision, Counsel for the Appellant-Petitioner, asked the Court of Appeals to reconsider its decision. The Court of Appeals declined to do so. A Notice of Appeal and Memorandum in Support of Jurisdiction was filed with The Supreme Court of Ohio. The Petitioner again raised the constitutional issues of the Right to Cross-Examine one's accusers and the Right to Due Process of law. The Supreme Court of Ohio declined jurisdiction on January 24, 2001, dismissing the appeal as not involving any substantial constitutional question. From that Judgment, this Petition for Writ of Certiorari is respectfully filed.

REASONS FOR GRANTING THE WRIT

In the instant case, the State of Ohio has adopted a rule of law permitting a trial court in a jury trial to deny an accused his constitutional right to Cross-Examine the witnesses for the prosecution after they have testified on matters relevant to both credibility and culpability.

On its face, it appears to be constitutional error of the first magnitude. Yet, the Courts of the State of Ohio have taken the position, that the denial of the right to cross-examine one's accusers is no more than harmless error.

In the instant case, the denial of the right to Cross-Examine is even more egregious, because the Trial Court, before excusing the key witness for the prosecution, was made personally aware by virtue of an in camera proceeding , that the witness had perjured himself on Direct Examination. The denial is further compounded by the fact that the perjury perpetrated before the jury by the police custodian was facilitated by the misrepresentation of personal knowledge on the part of the Prosecutor to the Trial Court, later admitted by the Prosecutor during Oral Arguments in open court at the Ohio Court of Appeals.

In spite of the above, the Ohio Court of Appeals found the denial of cross-examination, long held by this Court to be constitutional error of the first magnitude, to be no more than "harmless error". In spite of the above, the Ohio Supreme Court dismissed the Petitioner's appeal, "as not involving any substantial constitutional question." The only conclusion to be drawn, if not addressed by this Court, is that in Ohio, the Trial Court has virtually unfettered discretion to

deny Cross-Examination of key witnesses for the prosecution after they have testified against an accused on relevant matters, going to both credibility and culpability. Such a notion strikes at the heart of the adversarial system, envisioned in our Constitution's Sixth Amendment made obligatory to the States by way of the Fourteenth Amendment. As the result of the instant case, such a notion, albeit its seeming repugnancy to the Constitution of the United States, is the law in Ohio.

In Pointer v. Texas, (1964) 380 U.S. 400, this Court held at 403 that the Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right that applies to the States by virtue of the Fourteenth Amendment. This Court stated that the right of confrontation and cross-examination have "ancient roots", and as a result, this Court is "zealous to protect these rights from erosion." Pointer supra at 404-405 quoting *Greene v. McElroy, 360 U.S. 474, at 496-497.*

In Pointer v.Texas supra, the State attempted to introduce a transcript into evidence of a witness who had moved. The witness had testified at an earlier hearing in which the Petitioner without counsel did not cross-examine the witness. This Court held that it was a clear denial of the Petitioner's constitutional right to cross-examine his accusers, for this transcript to be admitted into evidence, without the benefit of adversarial cross-examination.

In Brookhart v. Janis, 384 U.S. 1, (1965) an earlier case challenging the Rule of Law in Ohio, this Court held that the constitutional right to confront and cross-examine one's accusers was so pre-eminent, that not even Petitioner's own Counsel could waive Petitioner's right to do so, without the

Petitioner's consent.

In Douglas v. Alabama, 380 U.S. 415 (1965) the Petitioner was denied the right to cross-examine an accomplice, who refused to testify on the grounds of self-incrimination. The accomplice however did sign a confession, apparently witnessed by three law enforcement officers. The Confession was read into evidence by the Prosecutor, and the Petitioner was given the opportunity to cross-examine the three law enforcement officers. This Court held that the right to cross-examine one's accusers to be so inviolable, that the opportunity to cross-examine those law enforcement officers would not "redress denial of petitioner's right" to cross-examine the accomplice. Douglas supra (See paragraph 2 of the syllabus.

In Smith v. Illinois, 390 U.S. 129 (1968) the trial court forbade the Petitioner from asking the name and address of his accuser on cross-examination. But this Court held that even such a seemingly nominal denial was a prejudicial violation of constitutional magnitude. "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." Smith supra at 131.

In Davis v. Alaska, 415 U.S. 308 (1974) the State of Alaska in attempting to protect its juveniles from the embarrassment of exposing their juvenile court records at trial adopted a rule of law that denied the right of cross-examination on that issue. In that particular case, the Alaska Supreme Court concluded that the Petitioner had ample opportunity to demonstrate bias through the remaining cross-examination that was not prohibited by Alaska. This Court held otherwise. The constitutional right to cross-examine was

paramount to the state's interest in protecting its juveniles from embarrassment. "Petitioner was thus denied his right of effective cross-examination, which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis,* 384 U.S. 1,3." *Smith v. Illinois, 390 U.S. 129, 131 (1968).* Davis supra at 318.

In United States v. Cronic, 466 U.S. 648, (1983) defense counsel was given insufficient time to prepare for trial, giving the prosecution an unfair advantage. This Court said: "As Judge Wyzanski has written: While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators. *United States ex rel. Williams* v. *Twomey,* 510 F.2d 634, 640 (CA7), cert. denied *sub nom. Sielaff* v. *Williams,* 423 U.S. 876 (1975). Cronic supra at 657 (footnote omitted).

In Cronic supra at 656 this Court envisioned the Sixth Amendment to mean " the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." Although that case involved the right to the effective assistance of counsel, this Court made it clear that a trial would be equally unfair if the accused were denied the right of effective cross-examination.

> "Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis* v. *Alaska,* 415 U.S. 308 (1974), because the petitioner had been

> "denied the right of cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), and *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966). Cronic supra at 659 (footnote omitted).

In the instant case, the Petitioner fought to cross-examine the police custodian, who was the legal custodian of the logging tapes that the Petitioner argued would exculpate him. On direct examination, the Police custodian, under the leading questioning of the Prosecutor, perjured himself, leading both the jury and the trial court to believe that both the Petitioner and Defense Counsel had listened to the Original Tapes with the crucial date and time stamp displayed. Petitioner and Defense Counsel were immediately aware of the perjury, because it was directed at them. The trial court became personally aware of the perjury during the in camera proceeding, but nevertheless excused this key witness for the prosecution without affording an opportunity for the Petitioner to cross-examine him. As a result, the Petitioner was irreparably prejudiced. The trial court's decision to deny Petitioner cross-examination of the police custodian was constitutional error of the first magnitude.

As the state Court of Appeals found, " the excluded evidence was directly relevant to one of the critical issues at trial , i.e. , whether appellant made harassing telephone calls to the Broadview Heights Police Department on the dates and times in question. (Court of Appeals Judgment Entry supra at III). The only person in legal possession of that key piece of evidence was the police custodian. After lying to the jury, he was permitted to leave the courtroom, unscathed and untested

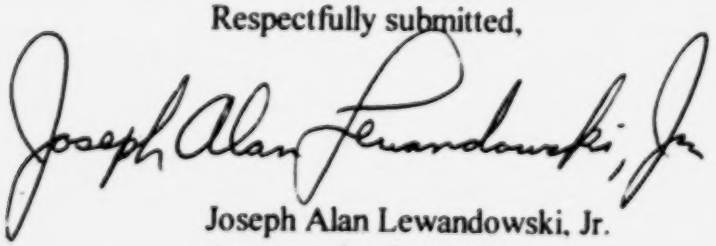
in the adversarial crucible of meaningful cross-examination.

In Ohio, this conviction stands. But without meaningful cross-examination, this conviction is not the result of a jury verdict, that is worthy of confidence that it has been rendered pursuant to the Sixth and Fourteenth Amendments of the United States Constitution. To deny an accused the right to cross-examine his accusers remains a constitutional error of the first magnitude that cannot be rendered harmless without undermining the integrity of our entire system of justice.

CONCLUSION

By being denied meaningful cross-examination of a key witness for the prosecution, after that witness had testified against the Petitioner on relevant matters of both culpability and credibility, Petitioner was denied a fair trial in accordance with the Sixth and Fourteenth Amendments of the United States Constitution. For this reason, Petitioner respectfully requests that this Honorable Court grant this Petition for a Writ of Certiorari to review these issues of great importance.

Respectfully submitted,



Joseph Alan Lewandowski, Jr.
Attorney for the Petitioner,
Ronald M. Baron

THE SUPREME COURT OF OHIO

City of Broadview Heights, Appellee	:	Case No. 00-1883
v.	:	Entry
Ronald M. Baron, Appellant	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

Costs:

Docket Fee, $40.00 paid by Joseph Lewandowski, Esq.

(Cuyahoga County Court of Appeals; No. 76490)

"s/THOMAS J. MOYER"
Chief Justice

FILED: January 24, 2001
Marcia J. Mengel, Clerk
Supreme Court of Ohio

PROPOSITIONS OF LAW
SUBMITTED TO THE SUPREME COURT OF OHIO

Proposition of Law No. 1: It is a violation of the Due Process Clause of the Fourteenth Amendment to deny an accused meaningful cross-examination of a witness for the State on a matter that is relevant to the guilt or innocence of the accused.

Proposition of Law No. 2: It is a violation of the Due Process Clause of the Fourteenth Amendment for a Prosecutor to knowingly elicit false, incorrect or misleading testimony from a witness for the State on a matter relevant to the guilt or innocence of the accused; and to fail to correct any false, incorrect or misleading impression that false testimony may leave on a jury, at the first opportunity to do so.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 76490

City of Broadview Heights :

Plaintiff-Appellee : JOURNAL ENTRY

v. : AND

Ronald M. Baron : OPINION

Defendant-Appellant :

Date of Announcement of Decision: August 3, 2000

Character of Proceeding: Criminal Appeal from Parma Municipal Court, No 98 CRB 02122.

Judgment: AFFIRMED

Date of Journalization: September 14, 2000

Appearances: For Plaintiff-Appellee: Timothy Miller, Esq., Special Prosecutor, City of Broadview Heights 1200 Ontario Street, 8th Floor, Cleveland, OH 44113

For Defendant-Appellant:
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TIMOTHY E. McMONAGLE, J.:

Defendant-appellant, Ronald M. Baron, appeals his convictions in the Parma Municipal Court of menacing, disorderly conduct and telephone harassment. For the reasons that follow, we affirm.

I.

In 1998, the City of Broadview Heights charged appellant with sixteen counts of alleged criminal behavior in seven criminal cases. In Case 98- RB-2122, appellant was charged with one count of menacing, in violation of City of Broadview Heights Codified Ordinance 636.06, and two counts of disorderly conduct. In Case 98-CRB-00543, appellant was charged with one count of disorderly conduct. The charges in these cases arose out incidents involving appellant and his neighbors on April 12, 1998, June 21, 1998 and November 7, 1998.

In Cases 98-CRB-03198, 98-CRB-03199, 98-CRB-03200 and 98-CRB-03201, appellant was charged with two counts each of telephone harassment, in violation of R.C. 2917.21. The charges in these cases stemmed from harassing telephone calls that appellant made to the Broadview Heights Police Department on August 20, 23, and 29, 1998.The cases were consolidated for trial.

Prior to commencing trial on April 6, 1999, the trial judge granted the City's motion *in limine*, precluding appellant from presenting evidence regarding a lawsuit that appellant had filed in United States District Court, alleging that the City of Broadview Heights, various members of the Broadview Heights Police Department and the city prosecutor had violated appellant's civil rights by bringing and maintaining various criminal actions, including those at issue in these cases, against him. In addition, the trial court

precluded appellant from introducing evidence of his military background and resultant post-traumatic stress syndrome.

During defense counsel's opening statement, however, the trial court determined that, despite numerous warnings and cautions by the court, defense couonsel had purposellly discussed these prohibited and other inflammatory matters with the jury during *voir dire* and his opening statement. Consequently, the trial court declared a mistrial. Finding that defense counsel's "defiant conduct in trial [had] interfered with the administration of justice, " the trial court held defense counsel in direct contempt of court and fined him $500, to be applied toward jury costs necessitated by defense counsel's conduct.

Apellant then filed an affidavit of prejudice seeking to disqualify the trial judge. The Cuyahoga County Court of Common Pleas denied appellant's motion, finding " that the record fails to demonstrate bias and prejudice against defendant by Judge Timothy P. Gilligan and Parma Municipal Court."

Trial commenced again on May 5, 1998. Prior to beginning trial, the trial judge again granted the City's motion *in limine* to exclude any reference to appellant's post-traumatic stress syndrome or any other case involving the appellant. The trial judge instructed counsel that " the only thing this jury is going to hear, and consider, is what happened on all the dates that are contained in these files."

The City called eleven witnesses. Bonnie Peretto testified that she and her husband, Fred, have lived next door to appellant for approximately three years. Mrs. Peretto described several confrontations with appellant that occurred in April 1998. According to Mrs. Peretto, on April 8, 1998, as she was pulling her into her driveway, appellant's wife, Mary Lynne Baron, yelled at her, " You have to take that fucking shed down." Mrs. Peretto called the police but no

charges were filed as a result of this incident. Mrs. Peretto testified that on April 9, 1998, as she was on her porch cleaning windows, appellant began yelling and screaming obscenities at her. Mrs. Peretto again called the police, who informed her that they could not take any action without proof of appellant's actions. On the following day, as Mrs. Peretto was getting into her car, appellant called a "fucking bitch." The police again informed Mrs. Peretto that they could not press charges without proof of appellant's actions, so Mrs. Peretto purchased a sound-activated taped recorder.

Mrs. Peretto then described appellant's attack on Daniel Puttera, a neighbor who lives on the other side of appellant's house, on June 21, 1998. According to Mrs. Peretto, as she was in her backyard that day, she observed Puttera walk into appellant's backyard and heard him say, "Ron, can we talk?" She then observed appellant grab Puttera from behind "like in a hug." Mrs. Peretto testified that Puttera did not resist as appellant then walked Puttera into his garage.

Mrs. Peretto also testified regarding an incident involving appellant that occurred on November 7, 1998. At approximately 10:00p.m., Mrs. Peretto was awakened by the barking of appellant's dog. Mrs. Peretto and her husband observed appellant and his wife, carrying flashlights, running in their backyard. Ms. Peretto then heard appellant yelling, "Bonnie, don't you want to come see your boyfriend. he's on my property." The Perettos recorded appellant's other shouted comments, which included calling Daniel Puttera offensive names and references to Mrs. Peretto masturbating, on their tape recorder and provided the tape to the City of Broadview Heights Police Department.

Frederick Peretto testified that on April 12, 1998, while he was outside in his yard with his dogs, appellant began berating and threatening him, yelling that he was going

to beat him up and tear down the shed in his yard. Appellant also told his dog, a large German Shepherd, to "kill" Peretto's dogs. Peretto tape-recorded this incident and provided th tape to the Broadview Heights Police Department.

City of Broadview Heights Police Officer Donald Polick testified that on April 11, 1998, he responded to a complaint from Bonnie Peretto regarding appellant but no charges were filed as a result of the incident.

Daniel Puttera testified that he has lived next door to appellant for over five years. According to Puttera, he returned home at approximately 8:00 p.m. on June 21, 1998 and observed that two trees in is backyard had been cut down. When the police came, Puttera told them that he believed that appellant had cut down his trees. The police informed Puttera that they could do nothing without proof of appellant's actions. Hoping that appellant might admit that he cut down the trees, Puttera told the police that he was going to walk over to appellant's house and talk to him.

Puttera testified that he walked into appellant's backyard and said "Ron, are you home?" When he saw appellant coming out of his house, Puttera said, "Ron, what's going on with these trees?" Appellant came up to Puttera and grabbed his arm, saying, "What are you doing on my property?" Appellant then shouted for his wife to "call the police" because Puttera was trespassing. According to Puttera, appellant then grabbed him in a bear hug and "manhandled" him into his garage, where Puttera tripped an fell to his knees.

Puttera also testified regarding the November 7, 1998 incident involving appellant. According to Puttera, at approximately 11:10 p.m., he walked back to his house, he saw appellant and his wife in their backyard. appellant accused Puttera of trespassing on his property. Puttera ignored appellant and walked back into his house. Shortly

after, the police arrived at Puttera's home and informed him that they had received a complaint form appellant that Puttera had trespassed on his property.

On cross-examination, Puttera denied that appellant had ever told him not to come on his property. Puttera also denied that he tried to hit appellant on June 21, 1998 when appellant had him in the bear hug or that he was trespassing on appellant's property on November 7, 1998.

City of Broadview Heights police officers Troy Schonberger testified that on June 21, 1998, he and Sergeant Kopniske responded to Puttera's complaint regarding his trees. Schonberger testified that Puttera told the officers that he was going to go to appellant's house to talk to him about the trees. Schonberger stood at the northeast corner of Puttera's house, from where he could see both Puttera's and appellant's backyards. he saw Puttera walk onto appellant's property, heard him call appellant's name, and then saw, appellant come out of his house and yell, " Dan, I have you now. You're on my property." Schonberger heard Puttera tell appellant to "calm down," and then saw appellant grab Puttera by the arm and lead him toward his garage. Schonberger testified that Puttera did not struggle or make any threatening gestures toward appellant.

Police Officer Robert Novotny testified that he and another officer were dispatched to the Peretto residence on November 7, 1998 to respond to Mrs. Peretto's complaint that appellant was yelling and creating a disturbance in his backyard. While that were taking Mrs. Peretto's statement, they were advised that another officer had been dispatched to appellant's home regarding an alleged trespasser in the backyard. The officers left the Peretto residence and went outside. Novotny testified that he observed appellant and his wife in their backyard. He saw appellant run over to Puttera's property line and heard appellant yell, "Dan, I got you now,"

and then start screaming obscenities.

Vickie Hutchinson testified that she is a dispatcher for the Broadview Heights Police Department. Hutchinson testified that on August 20, 1998, she received two anonymous telephone calls while she was working. At 7:51 a.m., a male caller asked how many of the forty-nine officers recently arrested in an FBI sting in the City of Cleveland were from Broadview Heights. At 8:31 a.m., a male caller asked her "how many barks are in a dog?" Hutchinson testified that she punched the star 57 keys on her telephone after both calls, activating a trace on the calls. Hutchinson then turned her dispatch log over the Detective Bureau of the Broadview Heights Police Department.

Crystal Kapitan testified that she was employed as a dispatcher for the City of Broadview heights Police Department during August 1998. Kapitan testified that she was employed as a dispatcher for the City of Broadview Heights Police Department during August 1998. Kapitan testified that at 1:02 a.m. on August 23, 1998, a male caller asked her "if your s--- don't stink." On August 29, 1998, at 10:44 p.m., an anonymous caller, referring to an incident involving a City of Broadview Heights councilman's wife, complained that a $5000 bond for a person who had killed someone was not enough and stated, "your community is corrupt." Kapitan activated the star 57 tracing mechanism on both calls.

The prosecutor played a cassette tape recording of the harassing telephone calls for the jury. Both Hutchinson and Kapitan admitted that the cassette tape played in court was not the original TEAC tape on which the harassing telephone calls were recorded but they identified the recording as a true and accurate recording of the calls they received on August 20, 23, and 29, 1998. Kapitan also testified that there was "no doubt in [her] mind' that the calls were made by

appellant. She state, "I know Mr. Baron's voice. I'm one of the only dispatchers that has ever actually talked to him when he's called us himself."

David Grossnickle testified that he is the Administrative Supervisor for the City of Broadview Heights Police Department. Grossnickle testified that all incoming calls to the Police Department are recorded on TEAC machines in the department. Because the TEAC machines are connected by heavy cables to a junction box in the Police Department, and not easily disconnected and transported to court, the policy of the Broadview Heights Police Department is to make copies of the TEAC tapes on a cassette tape when tapes are needed for court cases. Grossnickle testifed that, pursuant to departmental policy, he made a cassette tape recording of the prank telephone calls made to the Broadview Heights Police Department on August 20, 23 and 29, 1998 and identified Plaintiff's Exhibit 4, which was played for the jury, as the cassette tape he made. Grossnickle testified further that several months prior to trial, he and Timothy Miller, the special prosecutor, had met with appellant and defense counsel and played the original TEAC tapes, from which the cassette tape had been made, for them.

On cross-examination, defense counsel attempted to challenge the authenticity of the cassette tape. The trial court excused the jury and then questioned counsel regarding his basis for challenging the authenticity of the tape. When defense counsel informed the trial court that he was challenging the authenticity of the cassette tape because the original tape had not been produced in court, the trial court instructed defense counsel that because he had listened to the original TEAC tapes from which the cassette tape had been made, he did not have a good faith basis for challenging the authenticity of the tape and, therefore, was not to continue questioning Grossnickle on that point. Defense counsel

objected, insisting that he never listened to the original TEAC tape recordings of the telephone calls at issue. The trial judge then questioned Grossnickle regarding his earlier testimony that defense counsel had listened to the original TEAC tapes:

> COURT: Did he listen to the original TEAC tape off the machine? Mr. Lewandowski.
>
> GROSSNICKLE: Mr. Lewandowski listened to TEAC tapes. How many we played for him that day, I can't tell you how many I played for him.
>
> COURT: Can TEAC tapes be played on anything but the TEAC machine?
>
> GROSSNICKLE: Absolutely not.
> COURT: So, Mr. Lewandowski heard the originals?
>
> GROSSNICKLE: I would have to look at the dates and see the number of the date that he was there. Because after 90 days, I recycle the tapes.

The trial court then reiterated its finding that defense counsel did not have a good faith basis for challenging the authenticity of the cassette tape recording of the telephone calls. Defense counsel then proffered for the record the remainder of the questions he intended to ask Grossnickle, all of which related to the original TEAC tapes, and the trial judge excused Grossnickle from further testimony.

David Woehrman, manager of corporate security at Ameritech, testified that when the star 57 function is activated on a telephone, the Ameritech switching center records the number from which the telephone call originated.. Woehrman testified that records from Ameritech's Annoyance Call

Bureau indicated that the harassing telephone calls made to the City of Broadview Heights Police Department on August 20, 23 and 28, 1998 originated from 440/230-9290, which Ameritech records indicate is the telephone number for appellant's residence.

Sergeant Steven Kopniske testified that he is assigned to the Detective Bureau of the City of Broadview Heights Police Department. Kopniske testified that on June 21, 1998, he responded with Officer Schonberger to Puttera's complaint regarding the trees that had been cut down on his property. While the officers were investigating the complaint, they were advised that appellant had reported a trespasser on his property. While Officer Schonberger waited on Puttera's property to see what happened when Puttera confronted appellant regarding the trees, Kopniske responded to appellant's complaint. When Kopniske pulled into appellant's driveway, he observed Puttera held in a bear hug by appellant and then saw Puttera drop to his knees.

Kopniske also testified that when he was advised of the prank telephone calls made to the Police Department in August 1998, he contacted the Annoyance Call Bureau at Ameritech to obtain a report concerning the calls. He also instructed Grossnickle, pursuant to usual practice and procedure, to make a cassette tape recording of the calls.

After defense counsel had asked Kopniske several questions on cross-examination because "all of these questions *** is (sic) the same question asked time, and time, and time again. *** It's just the same thing." When trial resumed the next day, the trial judge advised defense counsel that he could continue his cross-examination of Kopniske but warned counsel that he would again discontinue cross-examination if counsel repeatedly asked Kopniske the same question. After defense counsel repeatedly questioned Kopniske regarding the original TEAC tapes on which the

prank telephone calls were recorded, the trial judge instructed defense counsel to ask a relevant question. When defense counsel again questioned Kopniske regarding the whereabouts of the original TEAC tapes, the trial judge discontinued further cross-examination.

Judith Labutta testified for the defense that she lives next to the Perettos. According to Labutta, she was outside tanning one day in 1998 when she heard Fred Peretto berate appellant, call him a "lowlife" and threaten to kill his dog. Labutta testified that Bonnie Peretto made similar remarks to appellant but Labutta could not identify when the comments were made.

Ronda Baron, appellant's thirteen-year-old daughter, testified that on June 21, 1998, she observed that her father had Puttera in a bear hug "and he couldn't get away."

Appellant's wife, Mary Lynne Baron, testified that on April 9, 1998, hen she questioned Bonnie Peretto regarding the Perettos' shed, Peretto called her "a lazy fat-ass bitch."

Baron testified further that on June 21, 1998,as she was in her house washing dishes, she saw someone in the backyard. Frightened, she called to appellant, who found Puttera trespassing in the backyard. Baron testified that Puttera had been on their property twenty to thirty times without their consent prior to this incident even though she and appellant had instructed him not to come on their property. According to Baron. Puttera repeatedly tore down the "No Trespassing" signs she and appellant posted on their property.

Appellant similarly testified that Puttera often came onto his property, even though he had been warned to stay off. Appellant testified that when Puttera trespassed on his property on June 21, 1998, he went up to Puttera and said, "Dan, I told you never to come on my property." According to appellant, Puttera then swung at him, so he grabbed him.

Appellant denied that he tried to hurt Puttera. Appellant testified that he found Puttera trespassing in his backyard again on November 7, 1998 and ordered him to stay off his property. Finally, appellant denied making any harassing telephone calls to the Broadview Heights Police Department.

The jury found appellant guilty of all charges, except the charges brought in Case 98-CRB-2464 relating to the incident on June 21, 1998. The trial court sentenced appellant as follows: 1) Case 98-CRB-2122, on count one, 180 days incarceration and a $250 fine, suspended; on counts two through four, 180 days incarceration and a $100 fine, suspended, on each count; 2) Case 98-CRB-00543, 0 days incarceration and a $100 fine, suspended; 3) Case 98-CRB-03198, 180 days incarceration and a $250 fine, suspended on each of two counts of telephone harassment; 4) Case 98-CRB-03199, 180 days incarceration and a $250 fine, suspended on each of two counts of telephone harassment; 5) Case 98-CRB-03200, 180 days incarceration and a $250 fine suspended, on each of two counts of telephone harassment; 6) Case 98-CRB-03201, 180 days incarceration and a $250 fine, suspended, on each of two counts of telephone harassment. The trial court ordered the sentences in Case Nos. 98-CRB-03198, 98-CRB-03199 and 98-CRB-03201 to be served consecutively and pursuant to R.C. 2929.41, the aggregate term to be served not to exceed eighteen months.

Appellant timely appealed, assigning five assignments of error for our review.

II.

In his first assignment of error, appellant contends that there were not sufficient grounds to declare a mistrial in his first trial and, therefore, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution precluded the

City from prosecuting him a second time.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "***nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This federal protection is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland* (1969), 395 U.S. 784; *State v. Gustafson (1966),* 76 Ohio St.3d 425, 432. Similarly, Section 10 Article I of the Ohio Constitution provides that "no person shall be twice put in jeopardy for the same offense." Jeopardy attaches when a jury is impaneled and sworn. *Christ v. Bretz* (1978), 437 U.S. 28.

Here, there is no doubt that jeopardy had attached in appellant's first trial before the trial judge declared a mistrial because the jury had been impaneled and sworn. The question, therefore, is whether appellee was prohibited from retrying appellant by the constitutional prohibition against double jeopardy.

When a mistrial is declared, *sua sponte,* without the consent of the defendant after jeopardy has attached, retrial is prohibited unless: 1) there is a "manifest necessity" or a "high degree" of necessity for ordering a mistrial; or 2) " the ends of public justice would otherwise be defeated." *State v. Widner (1981),* 68 Ohio St.2d 188, 189, citing *Arizona v. Washington* (1978) 434 U.S. 497.

In evaluating whether the declaration of a mistrial was proper in a particular case, the Supreme Court of Ohio has "declined to apply inflexible standards, due to the infinite variety of circumstances in which a mistrial may arise." *Widner, supra* at 190. Rather, the Ohio Supreme Court "has adopted an approach which grants great deference to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his [or her] courtroom warrants the declaration of

a mistrial." *State v. Glover* (1988), 35 Ohio St.3d 373. See, also, *United States v. Scott* (1978), 437 U.S. 82. "A defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Id., citing *Wade v. Hunter* (1949), 336 U.S. 684, 687.

Applying this test to the case at bar, we conclude that the trial court did not abuse its discretion in *sua sponte* declaring a mistrial and ordering anew trial on account of defense counsel's improper comments.

Prior to beginning the first trial, the City trial judge granted the City's motion *in limine*. Although the City had requested that the trial court preclude only evidence regarding appellant's post-traumatic stress syndrome and of the civil rights federal case, the trial court extended its ruling to also preclude any mention of appellant's military background. The trial judge then specifically instructed defense counsel not to make any mention of appellant's military background, his post traumatic stress syndrome and the civil rights lawsuit appellant filed in federal court. Nevertheless, after introducing himself to the jury during *voir dire*, defense counsel's first comment to the jury was, "My client is a totally disabled Vietnam veteran who has lost his hearing in his left ear." He then proceeded to ask the jurors whether they "could be fair to [appellant] because of his experience in the Vietnam War?" and informed them that '{Appellant] was in the Marines. And received several purple hearts and other decorations." Despite a warning from the trial judge that would complete the *voir dire* if defense counsel insisted upon asking inappropriate questions, defense counsel continued to do so.

The trial judge then again warned defense counsel that unless counsel asked appropriate questions, he would

complete *voir dire*:

> This is well out of control. Mr. Lewandowski, approach the bench please. You have not asked a permissible question in the last ten minutes. I'm going to give you probably two more inches of line and then I'm going to ask you to sit down. None of these questions have anything to do with jury selection. Your indoctrination has gone well beyond what is permissible. So if you want to move on, you may move on. However, you are very close to being sat down. If you are going to keep asking these crazy questions.

Despite the trial court's warning, defense counsel continued to discuss topics that he had been instructed not to mention. Because of defense counsel's refusal to comply with its instructions, the trial court completed the jury *voir dire* for defense counsel.

When defense counsel gave his opening statement, he continued to discuss prohibited topics with the jury, contrary to the trial court's instructions:

> Thank you for your attention on this.. This is the most important day in Ronald Baron's life. This case is about power, raw power, it's about abusive power. It's the story of Broadview Heights versus Ronald Baron. They have one goal in mind and that is to drive Ronald Baron from this community. At whatever cost. ***They want to drive the Vietnam veteran from their community***.
>
> *** This is what happened. ***After serving his country in Vietnam,*** Ron came home, married his high school

sweetheart. *** An incident took place in his life, that said what he vowed that he was going to move his family from Cleveland out to the suburbs, which was Broadview Heights.

What happened is, his son was shot. The bullet ricocheted through his body *** ***Ron Baron was aware of what happens when a person dies because he had seen so much death in Vietnam.*** ***

They used their money, their entire life savings, and they moved to Broadview heights.*** But Ron Baron made one mistake and that was he stepped on the toes of the people who were in power. The political leaders. And he did that by making a complaint that the property behind him that they were illegally turning that into a dump. A City dump.

Before Ron went to Vietnam he was really quiet. *** But when he came back *** he learned how to speak his mind. *** He said "Look, they're turning this into a dump. I don't care, do something about that." And he stepped on toes from the City. The big toes of the people who were in power. We're talking about the top echelon here. And that was a mistake. So what they did is they got together and they said, "We are going to drive you from that community." And his life has been living hell.

Some of the stuff that I'm going to tell you is so unbelievable, okay, this is what happens. *** Every opportunity that Ronald Baron has, the City will try to turn that against him. ***The accused him of making false alarms before. The jury acquitted him.***

(Emphasis added.)

Immediately after this comment, the trial judge declared a mistrial, concluding that defense counsel had poisoned [the] jury to the point that I don't think I can rehabilitate it."

In light of the discretion afforded to the trial court regarding the declaration of a mistrial, we decline to reverse the trial court's ruling. Our review of the record indicates that although the trial judge was perhaps too impatient with defense counsel, he properly concluded that in both *voir dire* and his opening statement, defense counsel repeatedly discussed matters with the jury that he had been specifically instructed not to mention. Further, we find it likely that defense counsel's inappropriate comments prejudiced the jury to such an extent that "the ends of public justice" could not be attained without discontinuing the trial.

Appellant's argument that the trial court should not have declared a mistrial because defense counsel did not mention appellant's post-traumatic stress syndrome or the federal lawsuit in his opening statement is without merit. I his opening statement, in defiance of the trial court's ruling regarding the City's motion *in limine,* defense counsel made repeated references to appellant's military service. Moreover, although defense counsel did not specifically mention the lawsuit appellant had filed in federal court, he commented about a prior case involving appellant and the City that had no relevance to the offenses at issue. Defense Counsel's reference to the prior case was apparently designed to prejudice the jury by implying that the City was unnecessarily harassing appellant in bringing these charges, the very same claim appellant made in his federal lawsuit.

"The overriding interest in the evenhanded administration of justice requires that we accord the highest

degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *State v. Abboud* (1983), 13 Ohio App.3d 62, 63, quoting *Arizona v. Washington* (1978), 434 U.S. 497, 511. Accordingly, we conclude that the trial court did not abuse its discretion in declaring a mistrial and ordering a new trial on account of defense counsel's improper comments.

Appellant's first assignment of error is overruled.

III.

In his second assignment of error, appellant argues that the trial court violated his constitutional right to confront the witnesses against him by limiting his cross-examination of Mr. Grossnickle. Appellant asserts that, contrary to Grossnickle's testimony on direct examination, defense counsel did not listen to the original TEAC tape recordings of the harassing telephone calls made to the Broadview Heights Police Department on August 20, 23 and 28, 1998. Therefore, appellant contends, the trial court's ruling prohibiting any cross-examination on this issue was prejudicial because the jury was left with the erroneous impression that defense counsel heard the original tapes. In addition, appellant argues that he should have been allowed to cross-examine Grossnickle regarding the City's failure to produce the original TEAC tapes at trial, even though appellant had subpoenaed them.

Cross-examination is to be permitted on all relevant matters and matters affecting credibility. See Evid.R. 611 (B). Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. That decision will not be reversed absent a clear

abuse of discretion which materially prejudices the objecting party. *State v. McCray* (1995), 103 Ohio App.3d 109.

In the instant case, we find that the excluded evidence was directly relevant to one of the critical issues of the trial, i.e. whether appellant made harassing telephone calls to the Broadview Heights Police Department on the dates and times in question. Appellant contended throughout the trial that he did not make the telephone calls at issue and the cassette tape recording of the calls was a fabrication. He asserted that the original TEAC tapes, which show the date and time of each telephone call made to the Broadview heights Police Department, would be exculpatory because the would show that it was impossible for him to have made harassing telephone calls to the Police Department on the dates and time in question. Therefore, the whereabouts of the original TEAC tapes and the reasons for the unavailability at trial was relevant evidence and a proper subject of cross-examination.

Moreover, the trial judge erred in finding that defense counsel did not have a good faith basis to challenge the authenticity of the cassette tape. The trial judge made its finding based on Grossnickle's testimony on direct examination that defense counsel had listened to the original TEAC tapes. However, upon questioning by the trial judge after the jury had been excused, Grossnickle admitted that he did not know if defense counsel had listened to the original TEAC tapes of the telephone calls at issue; he knew only that he had played some TEAC tapes for defense counsel. Accordingly, the trial court abused its discretion in prohibiting appellant's cross-examination of Grossnickle concerning whether defense counsel had listened to the original TEAC tapes of the harassing telephone calls, the whereabouts of the original TEAC tapes and the authenticity of the cassette tape recording of the calls.

In light of the other evidence adduced at trial,

however, the trial judge's error did not materially prejudice appellant. Both Hutchinson and Kapitan, the dispatchers who took the calls, testified on direct examination that the cassette tape recording of the harassing telephone calls was a "100% true an accurate" recording of the harassing calls they received on August 20, 23, and 29, 1998. Kapitan, testified further that there was "no doubt in [her] mind" that the calls were made by appellant because she recognized the voice from other legitimate telephone calls he had made to the Police Department.

Defense Counsel had full opportunity to cross-examine these witnesses regarding their testimony but did not challenge their testimony regarding the authenticity of the cassette tape recording. In light of their testimony, whether or not defense counsel heard the original TEAC tapes and whether or not the original tapes existed was irrelevant and, therefore, the trial court's error in limiting cross-examination of Grossnickle was harmless.

Appellant's second assignment of error is overruled.

IV.

In his third assignment of error, appellant argues that the trial court's actions and comments throughout his first and second trials prejudiced his constitutional right to a fair and impartial trial.

The judiciary must remain detached and neutral in any proceeding before it. *State v. Bayer* (1995), 102 Ohio App.3d 172, 174. Although there is no absolute prohibition to preclude a judge from commenting during a trial, the judge must bear in mind that his or her influence on the jury can be, and properly is, of great weight. *State v. Thomas* (1973), 36 Ohio St.2d 68, 71. Juries are highly sensitive to every remark made by the trial judge, who is the ultimate authority in the courtroom. Id.

When a trial judge asks questions or makes statements in the course of a criminal trial within the hearing of the jury, the questions or comments may be construed as an expression of opinion on the part of the judge concerning the credibility of a defendant or a witness, or his or her opinion as to the facts of the case. Prejudicial error may result when the jury believes that the trial judge has an opinion in the case. *State v. Kay* (1967), 12 Ohio App.2d 38, 49. Thus in a jury trial, "the court's participation by questioning or comment must be scrupulously limited, lest the court consciously or unconsciously indicate to the jury its opinion on the evidence or on the credibility of a witness." *State, ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, paragraph three of the syllabus.

In *State v. Wade* (1978), 53 Ohio St.2d 182, paragraph two of the syllabus, the Supreme Court of Ohio held that "[c]hallenged statements and actions of the trial judge in a criminal case will not justify a reversal of the conviction, where the defendant has failed in light of the circumstances under which the incidents occurred to demonstrate prejudice." In *Wade*, the Ohio Supreme Court set forth five factors for reviewing courts to consider in determining whether a trial judge's actions and remarks were prejudicial: 1) the burden of proof is placed upon the defendant to demonstrate prejudice; 2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for; 3) the remarks are to be made considered in light of the circumstances under which they are made; 4) consideration is to be given to their possible effect upon the jury; and 5) the possible effect of the remarks on the effective of counsel is to be examined. Id. at 188.

Appellant has not carried his burden of showing that the trial judge's remarks prejudiced his defense. Although

appellant contends that the trial court took control of *voir dire* from defense counsel in the presence of the jury before he discharged the jury in the first trial, appellant cannot demonstrate any prejudice as a result of these actions because the jury was discharged before deciding the merits of the case.

Appellant also contends that the trial judge's comments throughout the second trial indicated a bias against him and his counsel Appellant complains that before the trial started, the trial judge made disparaging remarks about defense counsel's legal competence when informing him that the court had again granted the City's motion *in limine* to preclude any mention about appellant's military background or post-traumatic stress syndrome. Appellant also complains that the trial judge berated defense counsel and questioned his integrity during the trial, when he informed counsel that he could not continue to cross-examine Grossnickle about the authenticity of the cassette tape that Grossnickle had made. Appellant complains that the trial judge's bias against him was also apparent when the trial judge instructed appellant that he would hold him in contempt and continue the trial without him if he continued to be disruptive in the courtroom. None of these comments were made in the presence of the jury, however. Moreover, our review of the record indicates that in each instance the conduct of appellant or his counsel warranted an instruction from the judge. Furthermore, in each instance, the trial judge permitted defense counsel to make an objection for the record to preserve his client's appellate rights. Thus, we find that appellant has failed to demonstrate that these remarks were prejudicial to his defense.

Appellant complains that the trial judge's impatience with him and his counsel was apparent to the jury when the trial judge, in the presence of the jury, discontinued defense counsel's cross-examination of Sergeant Kopniske, stating

that counsel had asked the same question, "time, and time, and time again." The record indicates that defense counsel had, in fact repeatedly asked the same question of Sergeant Kopniske on cross-examination. The trial judge had sustained many of the prosecutor's objections to defense counsel's questions and instructed defense counsel to ask a proper question. When defense counsel then insisted upon asking the same question again, despite the trial judge's warning, the trial judge limited counsel's cross-examination.

Although the remark may have been mildly intemperate, our review of the record indicates that in light of the circumstances in which the remark was made, there was no prejudice to appellant. After a thorough review of the entire trial transcript, we conclude that the judge's comments during trial which appellant objects to constituted efforts to keep the trial within reasonable bounds and/or were induced by the behavior of counsel.

Evid.R. 611 (A) recognizes the trial court's authority to exercise control over the courtroom.[1] Considering the criteria set forth in *Wade, supra,* we conclude that, within the context of the proceedings, the trial judge's comments represented the proper exercise of his authority to maintain order in the courtroom or monitor the presentation of evidence in accordance with Evid.R. 611 and were not prejudicial to appellant.

Furthermore, although we find no prejudice, any potential prejudice to appellant was offset by the trial court's

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[1] Evid.R..611 (A) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to 1) made the interrogation and presentation effective for the ascertainment of the truth, 2) avoid needless consumption of time, and 3) protect witnesses from harassment or undue embarrassment.

instruction which cautioned the jurors against being influenced by any impression they had of what the trial judge thought. Appellant's argument that the trial court's actions and comments denied him a fair trial is therefore not well taken.

Appellant's third assignment of error is overruled.

V.

In his fourth assignment of error, appellant argues that given his military service and medical and psychiatric conditions, the sentence imposed by the trial court "is so disproportionate to the crime that it violates the constitutional protection against cruel and unusual punishment." This argument is not well taken.

Appellant was convicted of twelve misdemeanors of the first degree and one minor misdemeanor. he was sentenced pursuant to R.C. 2929.21, which provides that terms of imprisonment for a misdemeanor of the first degree shall not exceed six months and fines shall not exceed $1000. R.C. 2929.21 further provides that there is no term of imprisonment for a minor misdemeanor and a maximum fine of $100. Pursuant to R.C. 2929.41, consecutive terms of imprisonment imposed for misdemeanors shall not exceed an aggregate of eighteen months.

Generally, if a sentence falls within the terms of a valid statute, it cannot amount to cruel and unusual punishment. See *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69. "[P]unishments which are prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown at common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community." *Id.* at 69. See, also, *State v. Chaffin* (1972), 30 Ohio St.2d 13, paragraph three of the syllabus.

Here the trial court followed the sentencing scheme set forth by the General Assembly and sentenced appellant to an aggregate of eighteen months of imprisonment on twelve counts of misdemeanors of the first degree. All of the fines imposed by trial court were suspended. Considering the nature of the offenses, we cannot say that appellant's sentence was disproportionate or shocking to the moral sense of the community.

Appellant's fourth assignment of error is overruled.

VI.

In his fifth assignment of error, defense counsel contends that the trial court erred in finding him in contempt of court and fining him $500. We decline to consider this argument, however, because defense counsel does not have standing to raise this issue in this appeal.

"It is an elementary concept of law, that a party lacks standing to invoke the jurisdiction of the court unless he has *** some real interest in the subject matter of the action." *State, ex rel. Dallman v. Court of Common Pleas* (1973). 35 Ohio St. 2d 176, 179. A party has a "real interest" where the party is directly benefitted or injured by the outcome of the case. *West Clermont Bd. of Edn.* (1980), 67 Ohio App. 2d 160, 162.

The subject matter of this case concerns the criminal liability of appellant. Thus, defense counsel has no "real interest" in the outcome of this case and, therefore, lacks standing in this appeal to challenge the trial court'soprder finding him in contempt of court.

Accordingly, we will not consider appellant's fifth assignment of error.

Judgment Affirmed.

It is ordered that appellee recover from appellant its

costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Parma Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

"s/Timothy E. McMonagle"
Judge

Karpinski, P.J. an
Spellacy, J. CONCUR.

RELEVANT PORTIONS OF THE TRIAL TRANSCRIPT

Direct Examination of the police custodian, in relevant parts, by the prosecutor.

BY: MR.MILLER:

Q. And Mr. Grossnickle, where are you employed?
A. Broadview Heights Police Department.

Q. In what capacity?
A. I am Administrative Supervisor.

Q. And what are your duties and responsibilities as administrative supervisor?

A. I'm custodian of the records. I also function as G.M. Administrator. I'm the terminal agency coordinator through LEADS NCIC. Also UNITELLIGBLE manager for 911.

Q. Okay. Do you have responsibility of overseeing the voice recording of calls into the Broadview Heights Police Department?

A. Yes, I also function as custodian of records.

Q. Okay. And can you tell us please how the voice recording system for incoming calls is done in the Broadview Heights Police Department.

A. We tape every telephone in the department ....

(Transcript of Trial at 172-173)(Direct Examination)

Q. Okay. Thank You. Oh, and do you recall several months ago, a time in which you and I met with Mr. Lewandowski?

A. Yes, I do.

Q. And do you recall that we took him through this whole thing.

A. Yes.

Q. And we played for him and his client the tape, the actual tapes in the -- off of the TEAC tapes.

A. Yes.

Q. And he listened to those tapes, did he not?

A. Yes.

Q. And he asked you a series of questions about those tapes?

A. Yes.

Q. And he heard the actual tape recordings, Didn't he?

A. Yes.

Q. Okay. Thank You.

MR. MILLER: Nothing further.

(Transcript of Trial at 179-180)(Direct Examination)

Cross-Examination of the police custodian by Defense Counsel, in its entirety.

BY: MR. LEWANDOWSKI:

Q. Officer Grossnickle?

A. Grossnickle.

Q. Grossnickle?

A. Yes.

Q. Those tapes are called T-160 tapes, are they not?

A. Correct.

Q. Okay. And when a call comes in, it's recorded on that Teac machine. Is that correct?

A. It's recorded on the tape, yes.

Q. Okay. And what does the Teac machine display when the call comes in?

A. Teac machine can display the number of feet that are left on the tape for the day. Or it can display the time and date.

THE COURT: Ladies and Gentlemen, we're going to take a -- excuse me for a minute, we're going to take

a break for a moment and somebody is going to escort the jury to the jury room.

(Transcript of Trial at 180-81)(Cross-Examination)

In Camera sidebar and questioning of the police custodian by the Trial Court.

BY THE COURT:

Counsel approach the bench. The jury has been excused from the courtroom. Mr. Lewandowski, do you have a good faith basis to challenge the authenticity of the tapes. If so, state them for the record please.

MR. LEWANDOWSKI: Yes, your honor.

THE COURT: What is that?

MR. LEWANDOWSKI: That good faith record statement is that the original of those tapes does not exist. It cannot be produced in any named fashion. Officer Grossnickle has made that representation to me. If we were to take our jury --

THE COURT: Mr. Lewandowski, did you follow request for discovery?

MR. LEWANDOWSKI: Your honor, we have --

THE COURT: That's a yes or no question.

MR. LEWANDOWSKI: -- subpoenaed the tapes. We had, at that time, we were --

THE COURT: Mr. Lewandowski, did you follow request for discovery?

MR. LEWANDOWSKI: No, I did not, Your Honor.

THE COURT: Have you filed a motion to suppress those tapes due to authenticity?

MR. LEWANDOWSKI: No, I have not.

THE COURT: Then you are herby instructed that you will no longer completely waste this juror time. I know you may have lots of time on your hands, and I wish I had the same. You are absolutely wasting these good people's time. And I am charged with controlling the tempo of this trial. I'm instructing you to stop wasting time.

You have not asked -- at least one half of your questions have not been relevant or germane to these proceedings. All of this charade we're putting on at this point in time has nothing to do with these proceedings.

If you really did, and I know that you really don't have a good faith basis to object to these tapes, then you should have filed a motion for discovery and a motion to suppress those tapes and to put forth your basis. The reason you didn't do that is because there really does not exist a challenge to these tapes. They have been identified, in Court, and

subject to cross-examination that they are a fair and accurate copy of the voices as they were heard on the dates in question. That's all that's required in the rules of evidence, and I'm sure you know that. Now do you understand?

MR. LEWANDOWSKI: I understand what you have said, your Honor, but I have to vigorously object.

THE COURT: It's noted.

MR. MILLER: Your Honor, if I may interject just for a second.

MR. LEWANDOWSKI: Can I respond?

MR. MILLER: This gentleman listened to the originals himself at the Broadview Heights Police Department. He heard there the exact verbatim of what was on those tapes. This is a gross waste of time.

THE COURT: That is completely unethical.

MR. LEWANDOWSKI: Judge that is --

THE COURT: Is that true?

MR. LEWANDOWSKI: -- totally false.

THE COURT: Is that true?

MR. LEWANDOWSKI: That is totally false and I resent the allegation that the original was listened off the Teac

recorder.

MR. MILLER: That's exactly what happened.

MR. LEWANDOWSKI: And I object to your professionalism --

THE COURT: Stop talking.

MR. LEWANDOWSKI: -- with respect to accusing --

THE COURT: Stop talking. Mr. Grossnickle.

MR. GROSSNICKLE: Yes.

THE COURT: Did he listen to the original Teac tape off the machine? Mr. Lewandowski.

MR. GROSSNICKLE: Mr. Lewandowski listened to Teac tapes. How many we played for him that day, I can't tell you how many I played for him.

THE COURT: Can Teac tapes be played on anything but the Teac machine?

MR. GROSSNICKLE: Absolutely not.

THE COURT: So, Mr. Lewandowski heard the originals?

MR. GROSSNICKLE: I would have to look at the dates and see the number of the date that he was there. Because after 90 days, I recycle the tapes.

THE COURT: There will be a separate hearing on this if it comes down to that. If that's true, that is absolutely unethical behavior. And you will be grievanced for that.. As for the proceedings, that we're going to move along right now, you are hereby instructed, that you will no longer question or argue the authenticity of these tapes. Because you do not have a basis for that. And it's absolutely unethical to do so. And I will have a -- hold a hearing at the conclusion of this trial to determine if you in fact did listen to those originals, and if you are standing here, blatantly, unethically, challenging those tapes and wasting this jury's time. Have a seat. Note your objection. And we're going to bring in the jury and we're going to get some work done.

MR. LEWANDOWSKI: Your Honor, I would like to make a note; if there is a hearing, and I am proved not to be in contempt, because I did not hear of those tapes, I am going to expect a written apology from this gentleman.

THE COURT: You have no grounds to stand here and say any of that. You have a seat and get out of your mind that you're running the courtroom. You are clearly not. You are the adversary (sic) for your client. You are not in charge of this courtroom. I am, sir. And begin to recognize that. I know your shortcomings. I'm aware of them. But begin to recognize and look around where you're at. You're in my courtroom, sir. And you will conduct yourself with decorum and

professionality. You have done nothing remotely close to that thus far. We are going to continue this trial. You are not going to interrupt this trial. You are not going to cause a mistrial as you have in the past. Return to your trial table and behave. And you do not run this courtroom. Return to your seat, sir, at this time. Sylvia, bring in the jury. Do you have any questions, Mr. Lewandowski, for Sergeant Grossnickle, other than the tapes, exhibits, plaintiff's exhibit four. Do you have any questions regarding Plaintiff's Exhibit 4? Other than questions regarding four.

MR. LEWANDOWSKI: Your honor, I'm sure if I have any questions for this witness. I think I may some questions for the witness.

THE COURT: Tell me what they are before we bring back the jury, please.

MR. LEWANDOWSKI: Your honor, I'm going to object to this.

THE COURT: Your objection is noted. And if you have any other questions, please tell the Court so I can determine the relevancy before we bring the jury.

MR. LEWANDOWSKI: Okay. Let's go through it here, you know what I mean. I can ask these questions of Mr. Grossnickle now?

THE COURT: No. You direct your questions to me.

MR. LEWANDOWSKI: Okay.

THE COURT: What area are you going to question?

MR. LEWANDOWSKI: Okay. You mean, the question is, what is the cost of the tapes? Do you have possession of the original tapes? Were the original tapes taken to the criminal property room? Can the original tapes be reproduced? If we were to have a jury view of the Teac machine, could we see the original verbatim conversation at that time?

THE COURT: Okay. And did you file a request for a jury view? I asked you a question, sir. Did you file a request for a jury view?

MR. LEWANDOWSKI: Your Honor, we --

THE COURT: Yes or no, sir?

MR. LEWANDOWSKI: No, we have not.

THE COURT: Then stop wasting this Court's time. You are clearly having some type of fun with this Court.

MR. LEWANDOWSKI: I am not having --

THE COURT: I am not enjoying it as much as you are. You're enjoying yourself. You're clearly wasting the jury's time. I don't believe you're

> as incompetent as you're acting. I clearly don't believe that. You know you didn't file a jury demand. You know that that's not even a relevant question. You're playing games. And I will not tolerate it. If you continue with the gamesmanship, I will hold you in contempt of Court. At this point in time, Mr. Grossnickle, you are discharged. No we'll go off the record and we'll bring in the jury. We are back on and the City is ready to call their next witness.

MR. MILLER: Thank you, Your Honor, call Mr. Woehrman.

(Transcript of Trial at 181-186)(In Camera sidebar and questioning of the police custodian by the trial court)

CONCISE STATEMENT AS TO TIME AND MANNER FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED FOR REVIEW

Petitioner vigorously objected to the denial of his right to Cross-Examine a key witness for the prosecution in Parma Municipal Court in May, 1999 after that witness had testified against the Petitioner on matters of both culpability and credibility. The trial court noted but overruled the objection as set forth in the Relevant portions of the Trial Transcript commencing on A-29 of this Appendix.

The denial of that right was then raised in his Second Assignment of Error to the Ohio Court of Appeals, Eighth District, which reads: The Trial Court Erred in Denying the Defendant His Right to Cross-Examine, in Violation of his Constitutional Right to Confront the Witnesses Against Him.

The Ohio Court of Appeals found that the evidence sought on Cross-Examination was directly relevant to one of the critical issues of the trial, to wit: the culpability of the Petitioner and that the trial court abused its discretion in prohibiting the cross-examination of a key witness for the prosecution. Nevertheless, the Court of Appeals, citing an Ohio Appellate Case, to wit: State v. McRay (1995), 103 Ohio App.3d 109 held that the trial court enjoys broad discretion in the admission and exclusion of evidence, absent a clear abuse of discretion that results in material prejudice. The Court reasoned that because the Petitioner was given the opportunity to cross-examine two other witnesses for the prosecution, the Petitioner was not materially prejudiced. As a result, the Court overruled Petitioner's second assignment of error. The relevant portion of the Ohio Court of Appeals opinion explaining and overruling Petitioner's Second

Assignment of Error is found in Section III of the Court of Appeals Opinion, on Pages A-20 through A-22 of this Appendix.

The Ohio Court of Appeals Journal Entry and Opinion was announced on August 3, 2000. Petitioner requested a Reconsideration of the Decision. The Court of Appeals denied the Reconsideration and Journalized the original Journal Entry and Opinion unchanged on September 14, 2000 as set forth commencing with A-3 of this Appendix.

Notice of Appeal was timely filed with the Ohio Supreme Court, along with a Memorandum of Jurisdiction. The Propositions of Law, again raising the denial of Petitioner's right to meaningful Cross-Examination are set forth at A-2 of this Appendix.

The Ohio Supreme Court declined jurisdiction to hear the case and dismissed the appeal, as not involving any substantial constitutional question on January 24, 2001 as set forth at A-1 of this Appendix.

Petitioner vigorously disagrees, despite the rule of law in Ohio, as this Court has always held the denial of an accused's right to meaningful cross-examination, to be constitutional error of the first magnitude, that no showing of want of prejudice will cure, as more fully set forth in this Petition for a Writ of Certiorari.

Respectfully submitted,

Joseph Alan Lewandowski, Jr.

Joseph Alan Lewandowski, Jr.
Attorney for Petitioner

(2)

Supreme Court, U.S.
FILED
MAY 29 2001

No. 00-1627

In The

Supreme Court of the United States

RONALD M. BARON,

Petitioner

v.

CITY OF BROADVIEW HEIGHTS

Respondent

On Petition For Writ of Certiorari
To The Supreme Court of the United States

SUPPLEMENTAL BRIEF OF PETITIONER TO PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENT TO OPINIONS BELOW FILED WITH PETITION FOR WRIT OF CERTIORARI

At the time of filing the Petition for Writ of Certiorari, to wit: April 24, 2001 the Opinion of the Courts below were still unreported. Since that time, the Opinions of the Courts below, to wit: the Opinion of the Ohio Court of Appeals, as set forth in the Appendix to the Petition for Writ of Certiorari has become REPORTED as well as the decision of the Ohio Supreme Court.

The Opinion of the Ohio Court of Appeals is now REPORTED as **CITY OF BROADVIEW HEIGHTS v. BARON,** and cited as *Broadview Hts. v. Baron* (2000), 139 Ohio App.3d 729, 745 N.E.2d 516, 2000 Ohio App. LEXIS 3483 (Ohio Ct. App., Cuyahoga County 2000), Cuyahoga County App. No. 76490.

The Decision of the Ohio Supreme Court dismissing the Appeal because of no substantial constitutional question is now REPORTED as **BROADVIEW HTS. v. BARON,** (2001) 91 Ohio St. 3d 1415, 741 N.E. 2d 142, 2001 Ohio LEXIS 134 (2001); (00-1883 Broadview Heights v. Baron, Cuyahoga App. No. 76490).

The introductory note in the REPORTED decision preceding the syllabus of the Court of Appeals Opinion reads as follows:

"Defendant was convicted in the Parma Municipal Court, Timothy P. Gilligan, J., of menacing, disorderly conduct and telephone harassment. He appealed. The Court of Appeals, Cuyahoga County, Timothy E. McMonagle, J.,

held that: (1) a mistrial and a new trial could be ordered, even though jeopardy attached; **(2) defendant's being precluded from cross-examining state's witness was not prejudicial error;** (3) trial judge's comments did not prejudice defendant; and (4) aggregate term of eighteen months of imprisonment was appropriate sentence. Affirmed.
(Boldface and underline added by Petitioner for emphasis).

The syllabus in the instant case, relevant to Petitioner's Writ of Certiorari and now cited in ***WEST'S KEY NUMBER SYSTEM*** as law in Ohio reads as follows:

4. Criminal Law {West Key Number 661}

A trial court enjoys broad discretion in the admission and exclusion of evidence.

5. Criminal Law {West Key Number 1153(1)}

A trial court's decision on the admission or exclusion of evidence will not be reversed on appeal absent a clear abuse of discretion which materially prejudices the objecting party.

6. Witnesses {West Key Number 271(1)}

In prosecution for telephone harassment, **defendant should have been allowed to cross-examine state's witness,** the administrative supervisor for a city police department, regarding the whereabouts of the original tapes of defendant's allegedly harassing calls to the department and the authenticity of the duplicate tapes that witness provided, **as the cross-examination would have been relevant to whether defendant made the harassing calls to the department on the dates and times in question.**
R.C. 2917.21; Rules of Evid., Rules 401, 611 (B).

7. Criminal Law {West Key Number 1170.5(1)}

In prosecution for telephone harassment, **trial court did not commit prejudicial error in precluding defendant from cross-examining state's witness, the administrative supervisor for a city police department,** regarding the whereabouts of the original tapes of defendant's allegedly harassing calls to the department and the authenticity of the duplicate tapes that witness provided, where dispatchers who took the calls testified that the duplicate tapes were true and accurate recordings of the harassing calls that they received. R.C. 2917.21; Rules of Evid. 401, 611 (B).
(Boldface and underline in the aformentioned West Key Number System are added by Petitioner for emphasis).

PETITIONER'S SUMMARY

The previously unreported opinion of the Ohio Court of Appeals and the decision of the Ohio Supreme Court dismissing the Appeal as not involving any substantial constitutional question are now **REPORTED**. Petitioner contends that the trial court committed constitutional error of the first magnitude in denying or "precluding" Defendant from cross-examining a key witness for the State who had testified at the trial on relevant matters going directly to both the culpability and credibility of the Defendant. Uncorrected, this case will serve as an unfortunate precedent for the proposition that the denial of cross-examination is no longer constitutional error of the first magnitude, even when that denial affects both the credibility and culpability of the accused.

Respectfully submitted,

Joseph Alan Lewandowski, Jr.

Joseph Alan Lewandowski, Jr.

Supplemental Appendix

Evid. R. 401 Definition of "relevant evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Evid. R. 611 (B) Scope of Cross-Examination

Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

R.C. 2917.21 Telephone Harassment (Relevant portions)

(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under the person's control, to another, if the caller does any of the following:

(1) Fails to identify the caller to the recipient of the telephone call and makes the telephone call with purpose to harass, abuse or annoy any person at the premises to which the telephone call is made, whether or not conversation takes placed during the telephone call;

(2) (Omitted by Petitioner)

(3) (Omitted by Petitioner)

(4) (Omitted by Petitioner)

(5) (Omitted by Petitioner)

(B) No person shall make or cause to be made a telephone call, or permit a telephone call to be made from a telephone under the person's control, with purpose to abuse, threaten, annoy or harass another person.

(C)Whoever violates this section is guilty of telephone harassment, a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense involving the same person, recipient or premises. (1995 S 2, eff. 7-1-96; 1980 H 164, eff. 4-9-81; 1972 H 511)